IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term 1976

NO. 75-6686

JAMES DOUGLAS HARRILL,
Petitioner

-vs-

STATE OF NORTH CAROLINA
Respondent.

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 289 NC 186, _____ S.E. 2nd _____ (1976).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USCA 1257(3).

QUESTIONS PRESENTED

I. Was the petitioner denied his constitutional right to trial by due process of law by

reason of the conduct of the trial judge during the trial and in settling the case on appeal.

II. Was the sentence of death imposed upon the petitioner unconstitutional.

STATEMENT OF CASE

The petitioner has filed with this court a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina in denying the defendant's Petition for Certiorari to review the trial court's settling of case on appeal which omitted certain statements desired by the defendant to be included in the case on appeal. The petitioner has also requested this court to review the imposition of the sentence of death imposed upon him under North Carolina General Statute 14-17 for murder in the first degree.

ARGUMENT

I

THE PETITIONER WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BY DUE PROCESS OF LAW BY REASON OF THE CONDUCT OF THE TRIAL JUDGE DURING THE TRIAL AND IN SETTLING THE CASE ON APPEAL.

The State would argue that the trial judge alone has jurisdiction of matters pertaining to settlement of a case on appeal. In *Hoke v. Atlantic Greyhound, Corp.*, 227 NC 374, 42 S.E. 2d 407 (1947) the court said:

> "It is the sole duty of that judge, from whose judgment an appeal is taken, to settle a case on appeal for this Court. The statute so contemplates, and, in the nature of the matter, another judge could not settle it for him. In such case, he alone is suppose to have the information essential to the proper settlement of the case."

By law in North Carolina the trial judge has the power to settle the case on appeal when the opposing sides cannot agree on the makeup of the record on appeal. N.C.G.S. 1-283. The State of North Carolina contends further, that the action of the trial judge when settling the case on appeal is final and will not be reviewed on appeal. *Millsap v. Wilkes*, 14 NC Ap 321, 188 S.E. 2d 663, Cert. denied 281 NC 623, 190 S.E. 2d 466 (1972).

Under the facts in this case, the state and the defendant's attorney could not agree on certain portions of the case on appeal. A hearing was held before the trial judge who made certain rulings excluding certain portions of the case on appeal that the defendant's attorney wished to place in the record. The defendant's attorney after this ruling by the trial court petitioned for certiorari to the North Carolina Supreme Court. The petition for Writ of Certiorari was denied by order of that court dated October 8, 1975.

The defendant contended that the following paragraph should have been inserted in the case on appeal to the North Carolina Supreme Court:

> "That at the close of all the arguments of counsel, defense counsel learned for the first time that the court had stated the previous day in the presence of the District Attorney, the Court Recorder and the Courtroom Clerk that it intended to charge the jury as to murder in the second degree. Defense counsel were not so informed and were permitted to argue the case under the assumption that the court was intending to abide by an earlier decision that the only issue would be first degree murder."

The State argues that nowhere in the transcript of the trial does it appear that the trial judge was not going to charge as to second degree murder. It is not incumbent upon the judge to make such a statement. Even if the trial court had made a statement to the affect that he was going to charge on second degree murder the previous day outside the courtroom, there would be nothing to prevent him from changing his mind upon further consideration.

And finally, the Defendant would suffer no prejudicial harm as the courts charge on Second Degree Murder, as could only have worked to his benifit while the Jury was deliberating.

II

THE DEATH SENTENCE IMPOSED UPON THE PETITIONER WAS NOT UNCONSTITUTIONAL.

The petitioner asserts that the penalty of death is cruel and unusual punishment. He also urges that the procedure through which a death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth amendments.

This court has received briefs and heard oral arguments on the questions raised by the petitioner in the case of *State v. Woodson and Waxton*, No. 75-5491, 1976 Term. Hence, petitioners question has, in essence, been accepted for hearing by the court. Therefore, any decision in this case should be dependent upon the outcome of the *Woodson* case, and the petition to grant certiorari should be denied.

CONCLUSION

It is therefore respectfully submitted that the question concerning the settlement of the case on appeal has been properly determined under the procedures set out in North Carolina without any violation of the defendants rights and that the Petition for Certiorari should be denied on this point. Second, the state contends that in as much as the question of the constitutionality of the death penalty is already before this court that petitioners Petition For Writ of Certiorari should also be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Response on Petitioner by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to his attorney:

Mr. J. H. Burwell, Jr.
Attorney at Law
624 North Main Street
Rutherfordton, North Carolina 28139

This the 17th day of May, 1976.

James E. Magner, Jr.
Assistant Attorney General